

## Charles Alan Wright and the Fragmentation of Federal Practice and Procedure

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Charles Alan Wright's preeminent treatise, *Federal Practice and Procedure*, is both an eloquent testament to his capacious intellect and an enduring legacy of the brilliant scholar.<sup>1</sup> Indeed, U.S. Supreme Court Justice Ruth Bader Ginsburg recently characterized Professor Wright as a "Colossus [who] stands at the summit of our profession" and declared that "all who practice the lawyer's craft profit from his prodigious production."<sup>2</sup> She also praised the 54-volume compendium as "by far the most-cited treatise in the United States Reports [and] the procedural Bible for federal judges and those who practice in our federal courts."<sup>3</sup>

Charles Alan Wright exercised a monumental command of the complex, dynamic, and arcane field that is federal practice and procedure. For one half-century, no corner of this sprawling, byzantine area was insufficiently significant to pique the scholar's curiosity or escape his enormous grasp. Throughout the field, ranging from the apparently least consequential features to the most compelling, intractable aspects, Professor Wright perspicaciously anticipated the manifestation and development of complications, facilitated comprehension of those problems that did arise, and crafted elegant solutions for the difficulties. Charles Alan Wright, therefore, richly deserves the encomium bestowed on the scholar's illustrious predecessor, Professor James William Moore, by Professor Robert Cover: "His treatise has kept before the profession a vision of the Federal Rules as a coherent structure; at the same time it has embraced the flexibility of application which lets

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1. CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* (1999). Professor Wright apparently edited every word in the treatise. Douglas Laycock, *Charles Alan Wright and the University of Texas School of Law*, 32 TEX. INT'L L.J. 367, 373 (1997); Interview with Steve Morris and Kris Pickering, in Las Vegas, Nev. (July 8, 2000).

2. Ruth Bader Ginsburg, *In Celebration of Charles Alan Wright*, 76 TEX. L. REV. 1581, 1586 (1998) (citations omitted). He served for eighteen years on the U.S. Judicial Conference Committee on Rules of Practice and Procedure and for three years on the Advisory Committee on Civil Rules. *Id.* at 1582.

3. *Id.* at 1583; see also *id.* at 1582 (stating that, were she limited to ten books on her "'see everyday' stand in chambers, *Wright on Federal Courts* would be among them"); Richard D. Freer, *Gladly Wolde He Lerne, and Gladly Teche*, 73 TEX. L. REV. 957 (1995) (book review) (praising the fifth edition of *Wright on Federal Courts*).

them serve so many ends.”<sup>4</sup>

Charles Alan Wright carefully identified and assiduously attempted to clarify myriad, untidy complications in federal practice and procedure; the quintessential example of this effort is the proliferation of local procedures that govern practice before the appeals and district courts.<sup>5</sup> In fact, three and a half decades ago, Professor Wright trenchantly denominated local strictures, especially provisions that conflict with the federal rules and congressional legislation, as the “soft underbelly” of federal practice and procedure.<sup>6</sup> The mid-1960s timing of the scholar’s description accentuates his prescience. Professor Wright’s salient prediction of the problems that would result antedated the caseload explosion that has transformed the appellate and district courts over the last generation as well as preceded the steady expansion of local measures that gradually fractured and ultimately balkanized federal practice and procedure.

During 1965, Charles Alan Wright initially emphasized the potential difficulties that multiplying local requirements might create. Thereafter, his one-volume and multi-volume treatises meticulously and incisively analyzed the “threat to the integrity of the Civil Rules [that] has come from the proliferation of local rules for particular districts.”<sup>7</sup> Professor Wright comprehensively traced the rather obscure origins and exponential growth of local mandates. Although the scholar acknowledged that Federal Rule of Civil Procedure 83 (as well as the analogous national provisos that cover admiralty, appellate, bankruptcy, criminal and evidentiary practice) specifically authorizes the appeals and district courts to adopt local rules, he tellingly cautioned that the drafters contemplated “these would be few in number and confined to purely housekeeping matters.”<sup>8</sup> Despite the drafters’ vision, local measures have dramatically increased and have become ubiquitous; thus, they currently regulate numerous, important activities that

4. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975). See generally JAMES WM. MOORE, *MOORE’S FEDERAL PRACTICE* (1938).

5. He typically emphasized local district civil rules. However, local procedures cover admiralty, appellate, bankruptcy, civil, criminal, and evidentiary practice as well. They also range across a broad spectrum from formal, “substantive” published rules, including one that reduces civil jury size, to informal, unwritten practices of individual judges that regulate matters in specific courtrooms, such as when motions are heard. I employ the terms in their broadest senses and interchangeably, but I emphasize the written rules of civil procedure applied by the ninety-four districts.

6. Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 n.6 (citing a letter from Charles Alan Wright to the editors of the *Duke Law Journal* (Nov. 16, 1965)); see also Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 10 (1994) (remarking on the “phrase that has since been much quoted”).

7. CHARLES ALAN WRIGHT, *FEDERAL COURTS* § 62, at 431 (5th ed. 1994); 12 WRIGHT ET AL., *supra* note 1, §§ 3152-3154. I rely here on both treatises; for convenience, I principally cite the one-volume work. For the pre-1966 history, see Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2011-18 (1989).

8. WRIGHT, *supra* note 7, § 62, at 431; see also Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944-51 (1996); Subrin, *supra* note 7, at 2013-16; Carl Tobias, *More Modern Civil Process*, 56 U. PITT L. REV. 801, 807 (1995); Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1255-57 (1967).

extend far beyond the circumscribed area of quotidian court administration.<sup>9</sup> The resulting inexorable expansion of local commands alone jeopardizes “uniformity of procedure throughout the country,” while local provisions frequently constitute a set of pitfalls for unwary attorneys who participate in litigation before multiple appellate or district courts.<sup>10</sup> Moreover, the “casual manner” of the local mechanisms’ prescription has strikingly contrasted with the attention that the federal rule revision entities have devoted to the amendment process.<sup>11</sup>

Professor Wright also perceptively recounted a series of unsatisfactory responses to the disadvantages, such as unwarranted expense and delay, that burgeoning local requirements have imposed. Two early responses that apparently had promise proved fruitless. First, the Supreme Court’s 1960 admonition that judges not employ local rules to introduce “basic procedural innovations”<sup>12</sup> seemingly heartened Wright. However, the potential of this pronouncement was undermined when the Court subsequently stamped its imprimatur on a local rule that reduced the size of civil juries from twelve to six members.<sup>13</sup> The second apparently promising development was the federal judiciary’s invalidation, through litigation, of many local provisions that instituted fundamental procedural reforms or that contravened the Constitution, the federal rules, or Acts of Congress. When analyzing this phenomenon, however, the scholar insightfully hastened to warn that parties have never challenged a plethora of additional questionable local strictures and these accordingly remain in force.<sup>14</sup>

Professor Wright believed that several, comparatively recent, attempts to rectify or ameliorate the complications that local procedural proliferation en-

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9. WRIGHT, *supra* note 7, § 62, at 431. *See generally* COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989); Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 7-24 (1997); Tobias, *supra* note 8, at 809-10, 814-16.

10. WRIGHT, *supra* note 7, § 62, at 431-32; *see also* Woodham v. Am. Cystoscope Co., 335 F.2d 551, 552 (5th Cir. 1964) (mentioning the possible traps because of multiple rules).

11. FED. R. CIV. P. 83, 1985 amend., advisory committee note, 105 F.R.D. 225, 226 (1985) (analyzing the local rule revision process); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1627-29 (1994) (comparing the federal and local rule revision entities); Charles Alan Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 565-66 (1967) (describing the federal rule revision process).

12. *Miner v. Atlass*, 363 U.S. 641, 650 (1960). *See generally* 12 WRIGHT ET AL., *supra* note 1, § 3153, at 517-20 (describing the Court’s reasoning in *Miner* and subsequent cases); *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 112-15 (1960) (detailing *Miner*); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1574-75 (1991) (presenting examples of the Court’s invalidating basic procedural innovations).

13. *Colgrove v. Battin*, 413 U.S. 149 (1973); *see also* 12 WRIGHT ET AL., *supra* note 1, § 3153, at 520-23; Carrington, *supra* note 8, at 950-55; *cf.* *Frazier v. Heebe*, 482 U.S. 641 (1987) (overturning a local rule denying lawyers who were neither residing nor working in Louisiana access to the bar).

14. WRIGHT, *supra* note 7, § 62, at 432 (citations omitted); *see also* Levin, *supra* note 12, at 1576. *See generally* Subrin, *supra* note 7, at 2019-26 (listing local rules conflicting with national rules); Tobias, *supra* note 8, at 814-16 (describing how local rules that conflict with national rules have proliferated).

tails, have proven no more effective than the earlier actions.<sup>15</sup> These efforts encompassed Supreme Court promulgation of the 1985 and 1995 amendments to the applicable national provisos, such as Federal Rule of Civil Procedure 83, which govern local practice,<sup>16</sup> and congressional passage of the 1988 Judicial Improvements and Access to Justice Act.<sup>17</sup> The national rule revisions and the statute requested that the Judicial Conference of the United States and the Circuit Judicial Councils review and abrogate or modify local appellate and district court measures determined to conflict or be redundant.<sup>18</sup> A closely-related, also unavailing endeavor was the Judicial Conference's Local Rules Project. This Project systematically scrutinized the local mandates that all thirteen appeals and 94 district courts had adopted before 1989 and "identified hundreds of instances in which local rules are inconsistent with the national rules or are otherwise of questionable validity."<sup>19</sup>

Nevertheless, Professor Wright expressed disappointment that the hopes "for progress in dealing with local rules. . . were dashed by the unnecessary and unwise Civil Justice Reform Act of 1990."<sup>20</sup> This statute encouraged each federal district court to implement local techniques for decreasing cost and delay, many of which contradicted or reiterated provisions applied in the remaining districts, the federal rules, and legislation.<sup>21</sup> The Civil Justice Reform Act compounded already substantial fragmentation; this fragmentation was further exacerbated when the 1993 amendments in the Federal Rules of Civil Procedure

15. WRIGHT, *supra* note 7, § 62, at 432; Wright, *supra* note 6, at 10; *see also supra* text accompanying notes 12-14.

16. *E.g.*, FED. R. CIV. P. 83, 1985 amend., advisory committee. note, 105 F.R.D. 225, 227 (1985); *see also* 12 WRIGHT ET AL., *supra* note 1, § 3152, at 499, 502-05; Tobias, *supra* note 8, at 817; *cf.* FED. R. APP. P. 47, 1995 amend., 514 U.S. 1142, 1143 (1995); FED. R. CIV. P. 83, 1995 amend., 514 U.S. 1157 (1995); FED. R. CRIM. P. 57, 1985 amend., advisory committee. note, 105 F.R.D. 179, 201 (1985).

17. 28 U.S.C. §§ 332(d)(4), 2071(c) (1994); *see also* H.R. REP. NO. 100-889, at 27 (1988). For descriptions of the 1998 Act, *see generally* Carrington, *supra* note 8, at 951-52; Tobias, *supra* note 11, at 1600-01. The 1995 federal rule amendments "codified" the mandates in the 1988 Judicial Improvements Act and subjected local measures that repeat federal rules or congressional legislation to review and modification. *Supra* note 16.

18. Sources cited *supra* notes 16-17; *see also* 28 U.S.C. § 331 (1994) (authorizing the Judicial Conference as the policymaking arm of the federal courts and prescribing its duties, which include review of appellate procedures); *id.* § 332 (authorizing the Councils as policymaking entities in the appeals courts and prescribing their duties, which include review of district court procedures).

19. Wright, *supra* note 6, at 10; *see also* Subrin, *supra* note 7, at 2020-26; sources cited *supra* note 8. The Project performed an exhaustive study that yielded revealing results on which little action has been taken. H.R. REP. NO. 100-889, at 28 (praising the Project's "valuable work").

20. Wright, *supra* note 6, at 10; *see also* Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833 (1994) (concluding that the CJRA dangerously narrows our perception of procedural justice); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) (arguing that the CJRA is not constitutional). *But see* Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994) (arguing that the CJRA is constitutional and justified to reduce caseloads).

21. WRIGHT, *supra* note 7, § 62, at 432; *see also* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 763-74 (1995); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1455-72 (1994); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 585-90; Wright, *supra* note 6, at 10-11.

explicitly empowered every district court to prescribe variations on certain national provisos covering discovery or to reject those commands completely.<sup>22</sup>

Therefore, as Professor Wright surveyed the "federal rulemaking scene," he observed the increased inconsistency engendered by the synergy between the 1990 Civil Justice Reform Act and the 1993 revisions in the Federal Rules of Civil Procedure; this disuniformity inevitably reminded him of Sir Edward Grey's 1914 remark about World War I: "The lamps are going out all over Europe; we shall not see them lit again in our lifetime."<sup>23</sup>

The sad passing of Charles Alan Wright means that he will never see the lamp of consistency lit. However, the darkness need not endure. It would be a fitting tribute to the memory of Charles Alan Wright if those responsible for maintaining and nurturing uniform federal practice and procedure could halt balkanization altogether or at least slow additional fragmentation. For example, particular appeals and district courts as well as individual judges might seize the initiative by canvassing their own local measures and abolishing or changing provisions deemed to be in conflict or repetitive. More specifically, districts could eliminate any remaining inconsistent or redundant mechanisms adopted pursuant to the ostensibly-expired Civil Justice Reform Act.<sup>24</sup> The Judicial Conference and the Circuit Judicial Councils might correspondingly complete the local procedural review that the 1985 and 1995 federal rules revisions and the 1988 Judicial Improvements Act require, while lawmakers should budget sufficient resources to facilitate discharge of the duties imposed.<sup>25</sup>

There is one final idea that can be implemented, but Congress is the appropriate branch to authorize the action. This would be to resurrect a 1991 proposed amendment to Federal Rule of Civil Procedure 83, one that the rule revisors withdrew out of apparent deference to the contemporaneous expense and

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22. E.g., FED. R. CIV. P. 26(a)(1), (b)(2), 1993 amend. See generally Chemerinsky & Friedman, *supra* note 21, at 775-78 (describing the variations resulting from Rule 26). The 2000 amendments, which the Supreme Court recently promulgated, essentially eliminate the "opt-out" provisions. FED. R. CIV. P. 26(a)(1), (b)(2), 2000 amend., advisory committee note, 192 F.R.D. 384-85, 391 (2000). See generally Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 236-37 (1999) (describing the Advisory Committee proposal that led to the 2000 amendments).

23. Wright, *supra* note 6, at 11; see also Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49 (1994) (criticizing the Advisory Committee's justifications for Rule 26 and arguing for a more coherent vision of national procedural goals). But see Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994) (describing the Advisory Committee's reasoning and the background to Rule 26 and arguing for a new commitment to the principle of judicial rulemaking).

24. E.g., D. MONT. R. 105-2; D. NEV. R. IB 2-2; D. OR. R. 72.1; see also Hajek v. Burlington Northern R.R. Co., 186 F.3d 1105 (1999). See generally Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM 887 (1998) (arguing that Congress or the Judicial Conference should proclaim that the CJRA has expired to force districts to eliminate CJRA-related mechanisms); *supra* notes 20-23 and accompanying text.

25. *Supra* notes 16-18 and accompanying text; see also Levin, *supra* note 12, at 1576-79; Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49, 76, 79 (1997).

delay reduction effort instituted under the Civil Justice Reform Act.<sup>26</sup> The suggested modification would empower federal district courts to experiment for not more than five years with local strictures that contradict or duplicate the federal rules or congressional statutes, if they secure Judicial Conference approval.<sup>27</sup> That approach should prove efficacious, principally because the alteration recommended strikes a carefully-calibrated balance. The proposal would foster uniformity while affording the requisite flexibility to experiment with promising devices and to develop felicitous solutions for peculiar local difficulties that the federal rules often do not resolve.<sup>28</sup>

The recent death of Charles Alan Wright is a grievous loss for everyone who is affected by, works in, or writes about federal practice and procedure. All of the actions suggested above would honor Professor Wright by reversing the balkanization that he decried and by restoring a measure of consistency to modern federal practice that local procedural proliferation now seriously threatens.<sup>29</sup>

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26. Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., *Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence*, 137 F.R.D. 53, 153 (1991) (proposing the amendment to Rule 83(b)); see also A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 891-92 (1993); Tobias, *supra* note 11, at 1616.

27. Comm. on Rules of Practice and Procedure, *supra* note 26. For an earlier proposal that would have authorized experimentation for two years with conflicting measures upon Circuit Judicial Council approval, see Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 370-73 (1983); see also Levin, *supra* note 12, at 1582-83; Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67.

28. In fairness, the federal judiciary may have applied conflicting or redundant local strictures to experiment, to address unusual local complications, or to treat rising dockets. However, the ideas that I proffer would be responsive to these needs and to the difficulties that local procedural proliferation creates. See Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853 (1989); see also Chemerinsky & Friedman, *supra* note 21, at 783-91; Levin, *supra* note 26, at 888-94; Tobias, *supra* note 25, at 68, 72-73.

29. John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1898 (1989) (characterizing proliferation as a “gross affliction”); Subrin, *supra* note 7, at 2011 (characterizing proliferating procedures as “wild flowers”); see also Levin, *supra* note 12, at 1568-69.